STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2002
v TADARREL CAMPBELL, Defendant-Appellant.	No. 231994 Wayne Circuit Court LC No. 00-004388

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v PERRY SHERMAN, Defendant-Appellant.	No. 234293 Wayne Circuit Court LC No. 00-004388

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendants TaDarrel Campbell and Perry Sherman were tried jointly before a single jury and were each convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant Campbell was sentenced to consecutive prison terms of eighteen to twenty-eight years for the murder conviction and two years for the felony-firearm conviction. Defendant Sherman was sentenced to consecutive prison terms of fifteen to twenty-five years for the murder conviction and two years for the felony-firearm conviction. Defendant Campbell appeals as of right, while defendant Sherman appeals by delayed leave granted. We affirm.

Decedent Robert "Boo" Card died of seven gunshot wounds, five of which entered his body from the back. The decedent and a friend, David Jones, had walked across the street to defendant Sherman's girlfriend's house and asked defendants why they shot at the decedent's mother's house. Neither defendant answered and the decedent and Jones turned to walk away when Jones heard shots. Jones and the decedent ran to their car, whereupon Jones realized that the decedent had been shot. The decedent was struck by bullets from two different guns. Two

eyewitnesses, watching from the upper flat where the decedent lived, saw the shooting and identified both defendants as the shooters. One eyewitness testified that defendant Sherman did not fire the first shot. Before the decedent died, he told the police, "Perry shot me."

There was evidence that the decedent was holding a forty-ounce bottle of beer in his hand when he went to talk to defendants. Defendant Sherman claimed that he had prior bad experiences with the decedent and was afraid of him. Sherman and his girlfriend both testified that the decedent hit defendant Campbell in the head with a beer bottle. Sherman said that he saw Jones pointing a gun at himself (Sherman) and Campbell. As Campbell was holding his head, Sherman heard gunshots and believed that either the decedent or Jones were firing at him and Campbell. Sherman testified that when he heard the gunshots, he pulled a gun and began to fire. A beer bottle with the decedent's fingerprints on it was later found in the trash.

In Docket No. 231994, defendant Campbell argues that the trial court erred by omitting his name from the jury instruction on self-defense. This Court reviews jury instructions as a whole to determine if there is error requiring reversal. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). "Jury instructions must include all elements of the charged crimes and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000) (citation omitted).

Defendant Campbell did not testify at trial. He did not request an instruction on self-defense and did not object to the instruction as given. Because defendant Campbell did not preserve this issue with an objection below, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Defense counsel argued to the jury that there was no credible evidence that defendant Campbell was armed, and that defendant Campbell was struck with a beer bottle, heard a shot, and ran away. We disagree with defendant Campbell's suggestion that the trial court's comments at sentencing, to the effect that defendant Campbell had not behaved like a man who was afraid, reflect the court's awareness that defendant was raising a claim of self-defense. Because defendant Campbell did not present evidence *at trial* on the issue of self-defense, did not argue that he shot the decedent in self-defense, and did not request a self-defense instruction, we find no plain error in the omission of his name from the court's instruction on self-defense. *Carines*, *supra*.

Defendant Campbell also argues that the instruction regarding defendant Sherman's claim of self-defense was inadequate. Although acknowledging that the trial court's instruction correctly stated the law, he asserts that the court failed to adequately inform the jury that a defendant does not have the burden of proving self-defense. We find this issue to be without merit. The trial court instructed the jury that defendant had no burden of proof and that the prosecution was required to prove that the defendant did not act in self-defense. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). In any event, because defendant Campbell did not argue self-defense, it follows that any error in the court's instruction did not affect defendant Campbell's substantial rights. *Carines*, *supra*.

Next, defendant Campbell asserts that the trial court improperly penalized him by instructing the jury that his failure to take the stand could not be used against him, and that the court then emphasized his failure to testify by instructing the jury that its decision should not be

based on which side presented the most witnesses. See CJI2d 3.3 and 5.2. Because defendant Campbell did not object to the jury instructions below, we review this issue for plain error. *Carines*, *supra*. We disagree with defendant Campbell's claim that the court's instructions were an improper comment on his failure to testify. As defendant Campbell concedes, the instructions are legally correct and, as noted previously, jurors are presumed to follow their instructions. *Graves*, *supra*. Thus, defendant has not shown plain error affecting his substantial rights. *Carines*, *supra.*

Defendant Campbell also argues that the trial court improperly denied defendant Sherman's request for an instruction on manslaughter. Because defendant Campbell did not request a manslaughter instruction at trial or object to the instructions given, this issue is reviewed for plain error affecting defendant's substantial rights. *Id*.

To support a conviction of voluntary manslaughter, there must be evidence that the defendant killed in the heat of passion, that there was adequate provocation, and that there was no lapse of time during which a reasonable person could control his passions. *People v Pouncey*, 437 Mich 382, 388; 471 NW2d 346 (1991). Although there was evidence that the decedent struck defendant Campbell in the head with a beer bottle, defendant Campbell did not testify or present evidence, and it was the defense theory that he did not shoot the decedent. Defendant did not argue manslaughter as an alternate theory. Thus, the trial court's failure to instruct on manslaughter was not plain error. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). See also *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002) (concluding that MCL 768.32[1] only permits instructions on necessarily included lesser offenses, not lesser cognate offenses).[1]

Further, defendant Campbell complains that the trial court erred by giving a "rambling, irrelevant lecture" as part of the jury charge. Again, this issue was not preserved by any objection below and, therefore, is reviewed for plain error affecting defendant's substantial rights. *Carines*, *supra.* In the challenged portion of the instruction, the trial court urged the jurors at length to openly share their opinions, to be honest with one another, and to listen to one another. We hold that the trial court's comments do not constitute plain error. *Id.*

Defendant Campbell also cites two comments made by the prosecutor during rebuttal argument, which he contends denied him a fair trial. "Prosecutorial misconduct issues are decided case by case . . . ." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000) (citation omitted). Because defendant did not object to the challenged comments below, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra*. A prosecutor is afforded great latitude in closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). An otherwise improper remark may not require reversal when it is responsive to defense counsel's argument. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Here, the

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[1] The *Cornell* decision was "given limited retroactive effect, applying to cases pending on appeal in which the issue has been raised and preserved." *Cornell*, *supra*, 646 NW2d at 145. Because the issue in this case was not preserved below, we do not rely on *Cornell* as the basis for our decision.

challenged remarks were responsive to defense counsels' suggestions that the prosecution witnesses were liars, and any prejudicial effect could have been cured by a timely request for a jury instruction. Thus, the remarks do not warrant reversal. *Schutte*, *supra*.

Finally, defendant Campbell contends that the trial court erred in denying his motion to quash because there was no evidence of premeditation and deliberation. We review the circuit court's denial of a motion to quash de novo to determine whether the district court abused its discretion. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). A district court must bind a defendant over for trial if there is competent evidence constituting probable cause to believe that a felony was committed and that the defendant committed that felony. *Id*. "Circumstantial evidence and the reasonable inferences arising from it are sufficient to support a bindover. . . . The prosecution is not required to prove each element of the crime beyond a reasonable doubt." *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997) (citation omitted). The district court's determination should not be disturbed unless it is "wholly unjustified by the record." *Northey*, *supra*.

David Jones, who was with the decedent at the time of the shooting, testified at the preliminary examination that the decedent asked defendants Campbell and Sherman why defendant Sherman had shot at his mother's house. Jones said that the decedent was not angry and that neither he nor the decedent were armed. Neither of the defendants responded to the decedent's question. It was not until Jones and the decedent turned and began to walk away that shots were fired. The decedent's brother testified that he saw defendants Campbell and Sherman shoot at the decedent as he tried to run away. The parties stipulated that most of the shots hit the decedent in the back of his body. In light of the circumstances and evidence that defendant Campbell waited until the decedent was running away before firing at his back, there was sufficient evidence of premeditation and deliberation to bind defendant over for trial on a charge of first-degree murder. *People v Daniels*, 192 Mich App 658, 664-666; 482 NW2d 176 (1992).

In Docket No. 234293, defendant Sherman similarly argues that there was insufficient evidence of premeditation and deliberation to allow the jury to consider the charge of first-degree murder. This Court reviews the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of first-degree murder were proven beyond a reasonable doubt. *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). As previously noted, viewed most favorably to the prosecution, the evidence here showed that the decedent attempted to have a conversation with defendants Sherman and Campbell and that he was shot several times in the back as he was leaving. Premeditation and deliberation may be inferred from the circumstances. *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999). The evidence that the decedent was shot while he was retreating was sufficient to allow the jury to infer that defendant Sherman had time to reconsider his actions. Consequently, we find no error.

Defendant Sherman also argues that the trial court erred in not instructing the jury on the lesser offense of manslaughter and that counsel was ineffective for not timely requesting the instruction. Manslaughter is a lesser included cognate offense of murder. *Pouncey*, *supra.* A requested instruction on a lesser cognate offense must be given if there is sufficient evidence to convict the defendant of the lesser offense. *Id*. However, defendant Sherman did not request an instruction on manslaughter when the trial court initially discussed the jury instructions with

counsel. The next day, after closing arguments, defendant Sherman's counsel made a record of a bench conversation he had with the trial court just before the jury charge:

> I'm satisfied that the . . . instructions . . . were given properly. I would like to indicate that for the record that Mr. Sherman, this morning, after having thought about it over night, apparently although we did discuss it yesterday, he inquired as to whether the instructions would allow – manslaughter could be given together. As the Court knows I made it known to the Court and the Court informed me that it could not be given at this point as we had already argued and have (inaudible) to the jury.

The timeliness of a defendant's request for a lesser included offense instruction "is a factor in determining its appropriateness." *People v Sears*, 124 Mich App 735, 743-744; 336 NW2d 210 (1983) (citation omitted). Here, defendant Sherman's request was not timely, it having been made only after the parties had already given their closing arguments. MCR 6.414(F). Therefore, the trial court did not err in refusing the instruction. Furthermore, even if a timely request had been made, failure to instruct on this lesser cognate offense would not have been error. *Cornell*, *supra*.

Next, defendant Sherman complains that counsel was ineffective for failing to timely request the manslaughter instruction. Because defendant did not request a *Ginther*[2] hearing, this Court's review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Here, it is apparent from the record that defendant Sherman participated in counsel's decision not to request a manslaughter instruction, and then later changed his mind. The initial decision not to request a manslaughter instruction was one of trial strategy and defendant has not overcome the presumption that this strategy was reasonable. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Finally, defendant Sherman contends that the trial court erred by admitting, over objection, the decedent's emergency-room statement to the police that "Perry shot me." Defendant Sherman testified at trial that he fired several gunshots in the direction of the decedent, believing that he had been fired upon first. The admission of evidence is reviewed for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000.) "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible under MRE 803(2). A statement need not be excluded merely because it is made in response to a question. *People v Smith*, 456 Mich 543, 553; 581 NW2d 654 (1998). The decedent had been shot seven times approximately a half hour earlier and remained in a great deal of pain. The circumstances did not suggest that the

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

decedent's statement was "the result of reflective thought." Accordingly, we find no abuse of discretion. *Id*.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell